STATE OF MICHIGAN

SUPREME COURT

JAMES O. GORE and BOBBIE N. GORE,

Appellees,

Supreme Court No. _____

Court of Appeals No. 248919

vs.

Lower Court No. 01-034913-CK

FLAGSTAR BANK, FSB,

Appellant.

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PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW RELATED TO FACTS OF THE CASE

I. DID THE COURT OF APPEALS PROPERLY RULE THAT PLAINTIFFS WERE PERMITTED TO ARGUE AT TRIAL THAT A CONTRACT EXISTED BETWEEN THEM AND DEFENDANT AND ALTERNATIVELY PRESENT A CLAIM BASED ON PROMISSORY ESTOPPEL?

THE COURT OF APPEALS ANSWERED:	**YES**
THE GORES ANSWER:	**YES**
FLAGSTAR ANSWERS:	**NO**

II. DID THE COURT OF APPEALS ACCURATELY OBSERVE THAT THE JURY FOUND PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM TO BE BASED ON A COMMITMENT IN WRITING WITH AN AUTHORIZED SIGNATURE BY DEFENDANT?

THE COURT OF APPEALS ANSWERED:	**YES**
THE GORES ANSWER:	**YES**
FLAGSTAR ANSWERS:	**NO**

III. DID THE COURT OF APPEALS PROPERLY RULE THAT THE PROMISE UNDERLYING PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM WAS NOT CONDITIONAL, GIVEN EVIDENCE THAT THE CONDITIONS HAD BEEN FULFILLED?

THE COURT OF APPEALS ANSWERED:	**YES**
THE GORES ANSWER:	**YES**
FLAGSTAR ANSWERS:	**NO**

IV. DOES DEFENDANT'S APPLICATION FOR LEAVE RAISE ANY ISSUES OF SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?

THE GORES ANSWER:	**NO**
FLAGSTAR ANSWERS:	**YES**

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A. LOWER COURT PROCEEDINGS

Plaintiffs, James and Bobbie Gore, commenced this action by filing their Complaint in Oakland County Circuit Court on September 24, 2001 (Complaint and Jury Demand; 9/24/01).[1] They alleged that they were the sole owners of a bowling alley in Milford, Michigan for approximately 15 years, and that NBD Bank held a first mortgage on the bowling center and, as additional security, a second mortgage on Plaintiffs' farm/residence, in Highland, Michigan (Complaint, p. 2, ¶¶ 5-6)[1]. Plaintiffs defaulted on their note to NBD in 1997, as the bowling center was producing insufficient revenue to meet the debt service. Id., ¶ 7. NBD foreclosed on the bowling center, liquidated the bowling center's assets, and also foreclosed on the second mortgage on Plaintiffs' residence. Id., ¶ 8. NBD's bid at the sheriff's sale on the residential property was $175,000, determined by NBD to be the net equity after payment of the first mortgage and unpaid real property taxes. Id. The redemption period was one year, ending March 31, 1999. Id., ¶ 9. The property consisted of the house and out buildings, plus about 50 acres of agricultural land. Id.

Plaintiffs began searching for an alternative lender who could finance the redemption of their property within the one-year period. Id., ¶ 10. They were able to negotiate a deal with NBD whereby the redemption price was reduced to $125,000. Id., p. 3, ¶ 11. The deficiency balance would be canceled -- a very advantageous arrangement. Id.

In early 1999, Mr. Gore approached Paul O'Connell, a loan officer at Defendant, Flagstar Bank, in Brighton, Michigan, seeking a loan. Id., ¶ 12. Mr. Gore explained the circumstances concerning the NBD foreclosure and the urgency of meeting the March 31, 1999 redemption deadline. Id., ¶ 13.

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[1] Exhibit A

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Through the month of March, 1999, Plaintiffs and Flagstar communicated repeatedly regarding closing on the mortgage loan transaction (Complaint, p. 4, ¶ 23)[2]. As the redemption deadline (March 31, 1999) approached, Plaintiffs' attorney sought an extension of the redemption deadline, and was told by NBD's lawyer that a mortgage commitment from Flagstar was a condition of such an extension (Complaint, ¶ 24, p. 4)[2]. Plaintiffs so indicated to Mr. O'Connell on March 24, 1999. Id., ¶ 25. On that same date, Mr. O'Connell, of Flagstar, sent the "Jim Gore approval letter" to Plaintiffs, their attorney, and NBD's attorney, at the office of NBD's attorney. Id., p. 5, ¶ 26. As shown at trial (Trial Exh. 24/35)[3], Flagstar issued an approval letter, indicating that Plaintiffs' mortgage loan application had been "conditionally approved," subject to certain, stated conditions (Trial Exh. 24/35)[3]. The loan amount was $182,000. Id. NBD relied upon the approval letter to extend the redemption period by two months (Complaint, ¶ 27)[2]. In return for the extension, Plaintiffs tendered $5,000 to NBD to be applied to the redemption. Id., ¶ 28. Plaintiffs continued to rely upon the loan approval letter as an assurance that they had the means to finance the redemption of their farm. Id., ¶ 29. Plaintiffs also continued to sell livestock at the behest of Mr. O'Connell in order to provide proof of funds on hand to close. Id., ¶ 30.

Flagstar's mortgage underwriter, Tina Cowan, reviewed Mr. Gore's loan application, which would typically be filled out by the loan officer (O'Connell in this instance) (TR., 1/24/03, 151)[4]. Cowan had in her possession, well before May of 1999, an appraisal indicating that the property consisted of "35 acres ... used as pasture," with three acres "used as a home site," and the balance "wooded." Id., 154-158[4]. She asked Flagstar's own appraiser for an appraisal

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[2] Exhibit A
[3] Exhibit B. (Trial Exh. 35 is a clearer copy)
[4] Exhibit C

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according to Flagstar's ten-acre guideline. Id., 158[5]. The loan application itself informed Cowan that Plaintiff was a cattle farmer. Id., 158-159[5]. (Trial Exh. 13)[6]. The approval letter indicates, "We're delighted to help you move a step closer to your home." (Trial Exh. 24/35)[7]. There is no "ten acre appraisal" condition listed in the approval letter. Id. (see also, TR., 1/24/03, 163)[8]. There are no subsequent approval letters containing additional conditions. There are internal documents indicating that Cowan was requiring a ten-acre appraisal, but none of them ever went to the Gores. Id., 166-169.

In Cowan's "Statement of Credit Denial" (Plaintiff's Trial Exh. E)[9], the listed reasons include "unacceptable appraisal"; "We do not grant credit to any applicant on the terms and conditions you have requested"; "over ten acres & working farm"; and "unacceptable property." All of these refer to the ten-acre appraisal and working farm guidelines noted above (Trial Exh. E)[9]. None of them was ever related to Mr. Gore. (TR., 1/24/2003, 65)[8].

Cowan had to concede that the conditions actually listed on the approval letter were satisfied, as indicated by the initials of the Flagstar employee(s), including herself, who signed off on the various conditions (TR., 1/24/03, 167-169)[8]; (Trial Exh. 2)[10]; (TR., 1/27/03, 4-10)[11]. In essence, Cowan stated that she terminated the loan because there was no "ten acre" appraisal in the file. (TR. 1/27/2003, 23-25)[11]. She had requested such an appraisal only from Flagstar personnel, however; Plaintiffs never knew of the requirement at all. (TR. 1/24/2003, 165-166)[8].

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[5] Exhibit C
[6] Exhibit D
[7] Exhibit B
[8] Exhibit C
[9] Exhibit E
[10] Exhibit F
[11] Exhibit G

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On May 20, 1999, less than two weeks before the extended, redemption deadline, an individual named Bill Herceg contacted Plaintiffs, advising them that he was working on closing the loan by May 31, on behalf of Fairway Mortgage Corporation, because Flagstar was declining the loan request -- the first notice to Plaintiffs or their lawyer that Flagstar was denying the loan. (Complaint ¶ 33).[12] By that time, it was too late to meet the redemption deadline through the Fairway arrangement. Id., p. 6, ¶ 37. In early June, 1999, Mr. O'Connell recommended to the Gores that they contact Craven Financial advise them to obtain the necessary financing. Id., p. 6, ¶ 38. By the time Craven committed, however, NBD had increased the amount necessary to redeem the home to $150,000, leaving Plaintiffs with insufficient funds. Id., ¶ 40. NBD sold the home in September, 1999 for approximately $330,000. Id., ¶ 41.

Plaintiffs brought this action on September 24, 2001, alleging, among other counts, Breach of Contract (Count I), and Promissory Estoppel (Count II) (Complaint, pp. 7-8). In Count I, they alleged that the loan approval letter (Trial Exh. 24/35)[13] was a binding contract between themselves and Flagstar (Complaint, ¶ 48).[12] Flagstar denied this allegation. (Answer, ¶ 48)[14]. In Count II, Plaintiffs alleged that Flagstar should have reasonably expected its promise of a loan (evidenced by the same exhibit) would induce forbearance on Plaintiffs' part in seeking other mortgage financing; and that the Plaintiffs had been so induced and had so relied, in a reasonable fashion. (Complaint, p. 8)[12]. Plaintiffs further alleged that "[i]njustice can be avoided only if Flagstar Bank's promises to enter into a mortgage loan with the Gores are enforced, and damages are awarded for the breach of those promises." Id., ¶ 58.

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[12] Exhibit A
[13] Exhibit B
[14] Exhibit H

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Plaintiffs demanded a trial by jury. (Complaint p. 10)[15]. Flagstar moved for summary disposition on the ground that certain conditions to the loan had not been met, which motion the Circuit Court denied at a hearing on August 21, 2002 (TR., 8/21/02, p. 13; Order entered: 8/29/02)[16]. In addition, Defendant's motion for directed verdict, based on, among other arguments, the Statute of Frauds, MCLA 566.132(2)(a), was denied by "Opinion", entered on January 29, 2003[17]. The Circuit Court concluded that the exhibit which is attached to this Brief (Plaintiff's Trial Exhs. 24/35)[18] created a jury question whether there was a sufficient writing to meet the Statute of Frauds, insofar as the necessary terms of the contract, or alternatively, the promise (for purposes of the promissory estoppel count) and the necessary signature, per the Statute of Frauds, were concerned ("Opinion" entered: 1/29/03, Part III)[17]. In particular, the Circuit Judge concluded that a reasonable jury could find that, despite the lack of a "traditional handwritten signature," the "fax cover sheet notation or signature block of the March 24 Commitment Letter[18] were created with the present intention to authenticate the writing by an authorized signatory." Id.

In opening statement, defense counsel urged that the loan was subject to conditions which Plaintiffs had failed to meet, so that the loan approval letter "was not a commitment," and hence, incapable of supporting Plaintiffs' claims (TR., 1/21/03, p. 92)[19]. Indeed, defense counsel urged that it "couldn't make the loan," because Plaintiffs could not meet the Bank's own guidelines. Id., 97. Defense counsel urged that the Bank had a "right to set requirements for making a loan ..." Id., 99. More specifically, defense counsel urged that the Bank, according to its own

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[15] Exhibit A
[16] Exhibit I
[17] Exhibit J
[18] Exhibit B
[19] Exhibit K

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guidelines, is not in the practice of making loans for a "working farm," among other, allegedly necessary "conditions" which "weren't met" (TR., 1/28/03, 63)[20]. According to defense counsel, "essentially our case, as I said in the opening statement, is a case of conditions." Id., 65. In addition, because the farm property was greater than 10 acres, it would be reviewed "on a case-by-case basis," but the appraisal value "must be based on only the ten acres" with the actual residential buildings, defense counsel argued. Id., 68. Defense counsel further argued that it could not be held liable for breach of contract because "the conditions here just simply are not met." Id., 72[20].

The Circuit Judge instructed the jury on both the breach of contract and promissory estoppel theories, giving separate instructions as to each of those counts. Id., 83-84. The Circuit Judge also instructed the jury on the Statute of Frauds issue, telling the jurors that in order for Plaintiffs to prevail, the jury must conclude that "the Defendant made a promise or commitment to lend money to the Plaintiffs in writing and signed with an authorized signature by the Defendant," and that a typewritten name, under Michigan law, "may satisfy the signature requirement as long as the party typing his or her name intends to authenticate the same." Id., 82-83[20]. Upon the jurors' request, the Circuit Court repeated these instructions (TR., 1/29/03, 3-4)[21]. The jury concluded, following the questions on the verdict form, that Plaintiffs had satisfied the Statute of Frauds by means of the loan approval letter, and that Plaintiffs had failed to prove that Defendant breached a written contract, but that Plaintiffs had proved a claim of

[20] Exhibit L
[21] Exhibit M

promissory estoppel. The jury awarded damages of $206,856 (TR., 1/29/03, 10-11;[22] Original jury verdict form[23]). The Circuit Court entered judgment upon the verdict (2/11/03)[24].

Defendant then filed Motions for Judgment Notwithstanding the Verdict (JNOV) and for New Trial (3/4/03). By "Opinion and Order" (5/14/03)[25], the Circuit Court granted JNOV. Although the Court, in the said Opinion and Order, seemed at first to adhere to its previous ruling denying a directed verdict on the Statute of Frauds issue (Id., pp. 6-8), the Court went on to conclude that Plaintiff's promissory estoppel theory (the only theory on which Plaintiffs prevailed at trial) was precluded. Id., 10-11. The Court so held notwithstanding the Court's recognition of a party's right to assert alternative theories. Id., p. 9; citing, *inter alia*, MCR 2.111(A)(2). In addition, the Court ultimately reversed itself on the Statute of Frauds issue, concluding that the Statute "bars Plaintiffs' promissory estoppel claim because the Statute prohibits any claims relating to commitments of loans by financial institutions" (Opinion and Order; pp. 13)[25]; citing, MCLA 566.132(2); Crown Technology Park v D & N Bank, 242 Mich App 538 (2000).

Plaintiffs timely filed their Claim of Appeal on June 3, 2003. The Court of Appeals, in an unpublished per curiam opinion issued on November 9, 2004,[26] vacated the trial court's May 14, 2003, Opinion and Order[25] granting judgment notwithstanding the verdict and reinstated the original judgment of February 11, 2003, based on the jury's verdict.

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[22] Exhibit M
[23] Exhibit N
[24] Exhibit O
[25] Exhibit P
[26] Exhibit Q

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B. DISCUSSION

I. THE COURT OF APPEALS PROPERLY RULED THAT PLAINTIFFS WERE PERMITTED TO ARGUE AT TRIAL THAT A CONTRACT EXISTED BETWEEN THEM AND DEFENDANT AND ALTERNATIVELY PRESENT A CLAIM BASED ON PROMISSORY ESTOPPEL.

Flagstar's Application for Leave to Appeal is based on the false factual premise that the trial judge decided, as a matter of law, that a binding contract existed between Flagstar and the Gores. Flagstar contends that, "[i]n his Opinion…Judge Warren ruled as a matter of law that a written contract governed the transaction and therefore the jury should not have been instructed on promissory estoppel."[27] Later, Flagstar contends, "Judge Warren, in his Opinion, did not rely on the jury verdict to determine that there was a valid contract in this case. Rather, Judge Warren decided the issue as a matter of law in reviewing the testimony of the witnesses."[28] This is not, however, what happened.

In his JNOV opinion, the trial judge expressly [and mistakenly] found that **the jury** had determined that a binding contract existed when he wrote,

> "In fact, as explained infra, to sustain the claim for any purpose whatsoever, the Plaintiffs were required to prove that a written agreement, signed by the Defendant, existed. **The jury in the instant case found that such an agreement *existed,*** and also found that the Defendant failed to breach that agreement." (JNOV Opinion, p. 13; emphasis supplied).[29]

The Court of Appeals accurately observed that the trial court had erroneously found that ***the jury*** had determined a contract to exist. The Court of Appeals observed,

> "In granting JNOV, ***the trial court observed that the jury***, in response to Question No. 1 on the special verdict form, found that plaintiffs' claims against defendant were 'based upon a promise or commitment which is in writing and signed with an authorized signature by the [d]efendant.' ***The trial court apparently equated***

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[27] Application, page 1.
[28] Application, page 4.
[29] Exhibit P

this special finding with a determination that the jury found the existence of an enforceable contract. " (Court of Appeals Opinion, p. 2; emphasis supplied).[30]

The Court of Appeals went on to explain and correct the trial court's error, stating, "[h]ere, however, the record does not demonstrate that the jury found the existence of an enforceable contract." (Court of Appeals Opinion, p. 3).[31] The Court of Appeals accurately determined that jury Question No. 1, answered in the affirmative, established that there was a promise or commitment in writing signed by an authorized signature by the Defendant, so as to satisfy the statute of frauds, but not that there was an enforceable contract between the parties. The Court of Appeals accurately observed that, "[t]he jury was not asked to determine whether a valid, enforceable contract was established. Not every promise gives rise to rights enforceable in contract. Thus, the jury's 'yes' response to Question No. 1 does not compel the conclusion that the jury found an enforceable contract between the parties." (Court of Appeals Opinion, p. 3).[31]

Flagstar's entire argument in support of its Application, that the trial court properly found, as a matter of law, that a binding contract existed between the parties, falls once the falsity of its factual premise is revealed. Even the trial court disagreed with Flagstar's argument that the determination of whether a binding contract existed was one for the trial court to itself decide as a matter of law. It gave both the contract claim and the promissory estoppel claim to the jury, as it should have. The trial court simply made the mistake, in its JNOV opinion, of misreading jury Question No. 1, to be a jury finding that an enforceable contract existed, when it was only a finding of a written commitment satisfying the statute of frauds. The Court of Appeals realized this, and pointed this mistake out in its Opinion of November 9, 2004.[31]

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[30] Exhibit Q
[31] Exhibit Q

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Flagstar's Application for leave, rather than demonstrating error in the Court of Appeals Opinion, fails due to its own inaccurate factual premise.

The key point remains, that the jury could have found, consistent with the proofs, that Plaintiffs failed to prove all the necessary elements of an enforceable contract, yet had satisfied all of the elements of promissory estoppel. The jury need not have agreed that the Plaintiffs advanced consideration for the promise; and further, need not have agreed that there was mutuality of agreement, i.e., that there was a meeting of the minds, each of which are necessary elements of a contract claim, under Michigan law. Thomas v Leja, 187 Mich App 418, 422 (1991). The jury could have found, for example, that parties' minds did not meet as to what exactly the "conditions" for the loan were (indeed, this is a matter which the parties still disagree on, as will be demonstrated further on within the Arguments [*infra*]). The jury may have found that Defendant made an unconditional promise of the loan, even though Defendant did not share Plaintiffs' intent, for contract purposes. "It is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." Lagalo v Allied Corp., 457 Mich 278, 282 (1998).

The fact remains that this is not a case in which the jury, of necessity, concluded that an express, enforceable contract existed between these parties. Therefore, it was entirely permissible for the jury to find for Plaintiffs on the promissory estoppel theory which was the alternative basis for recovery. MCR 2.111(A)(2). The jury found that Defendant made a written promise, but did not expressly conclude that there was a written contract, valid and enforceable, between these parties. It follows that Defendant's argument lacks merit, and that the Circuit Court erred in granting judgment notwithstanding the verdict.

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II. THE COURT OF APPEALS ACCURATELY OBSERVED THAT THE JURY FOUND PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM TO BE BASED ON A COMMITMENT IN WRITING WITH AN AUTHORIZED SIGNATURE BY DEFENDANT.

It is worth noting that in Defendant's flagship case, Crown Technology Park v D&N Bank, 242 Mich App 538 (2000), there was no writing at all which would have reflected modification of the written prepayment clause at issue. In the present case, the writing which satisfies the Statute of Frauds is the loan commitment letter.[32]

The trial court, even in his JNOV opinion, found that "[u]nder the circumstances, reasonable minds could determine that the March 24 commitment letter contained an authorized signature within the meaning of the Statute of Frauds. Similarly, sufficient evidence was before the jury for them to reasonably conclude that the fax cover sheet alone or in concert with the commitment letter constituted a signature on behalf of the Defendant."[33] The Court of Appeals agreed, holding that "the jury's 'yes' response to Question No. 1 and their verdict in favor of plaintiffs on the promissory estoppel claim, considered in light of the parties theories, can be harmonized to mean that the jury found the existence of a written promise to support recovery under a promissory estoppel theory."[34]

III. THE COURT OF APPEALS PROPERLY RULED THAT THE PROMISE UNDERLYING PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM WAS NOT CONDITIONAL, GIVEN EVIDENCE THAT THE CONDITIONS HAD BEEN FULFILLED.

Defendant urges that a conditional contract "is still a valid and binding contract," but the case law references given for that proposition will not sustain Defendant's analysis. In each of the cases cited, there was a failure to satisfy a condition precedent, which, according to the

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[32] Exhibit B
[33] Exhibit P, at pp 7-8.
[34] Exhibit Q, at p 3.

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Court of Appeals, prevents "a cause of action for failure of performance. Lee v Auto-Owners Insurance, 201 Mich App 39, 43, 505 N.W.2d 866 (1993)." Berkel & Co. v Christman Co., 210 Mich App 416, 420 (1995). In neither of the cases just cited (referred to by the defense herein; Defendant's Application, p. 12) will this Court find a statement that a conditional contract is valid and binding contract even if the conditions are never fulfilled. To the contrary, each of those cases plainly stands for the proposition that failure to satisfy a condition prevents the Plaintiff from stating a cause of action for breach of contract. See, Lee, 201 Mich App 39, 43.

The more accurate statement of Michigan law is that if a necessary condition "is not fulfilled, the right to enforce the contract does not come into existence." Knox v Knox, 337 Mich 109, 118 (1953). To put it another way, the agreement never becomes binding if the necessary conditions never occur. Professional Facilities Corp. v Marks, 373 Mich 673, 679 (1964) ("no contract has yet been made" in such circumstances). See also, Opdyke Investment v Norris Grain, 413 Mich 354, 359 (1982). In each of the cases cited by Defendant, furthermore, an express contract unquestionably existed.

Defendant seeks to support the Circuit Court's grant of judgment notwithstanding the verdict on a rationale the Circuit Court did not employ, namely, that the loan commitment promise was conditional, and the conditions did not take place. Defendant's argument is factually inaccurate. Defendant's agent, Cowan, the Defendant's decisionmaker, had to concede that the conditions which Defendant actually listed on the approval letter were satisfied, as indicated by the initials of Flagstar employees, including herself, who signed off on the various conditions listed therein (TR., 1/24/03, 167-169)[35]; (Trial Exh. 2)[36]; (TR, 1/27/03, pp. 4-10)[37]. In

[35] Exhibit C
[36] Exhibit F
[37] Exhibit G

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fact, the record is clear that it was on the basis of unlisted, secret "conditions" (known only to the Bank itself, Defendant), that Cowan denied the loan, namely, the ten-acre appraisal and working farm guidelines. (Trial Exh. E)[38]. These so-called "conditions" were items which the Bank never related to Mr. Gore (or his wife, for that matter). Cowan stated that she terminated the loan because there was no "ten acre" appraisal in the file (TR., 1/27/03, pp. 23-25).[39] Plaintiffs never knew of this requirement. (TR., 1/24/03, p. 65).[40] Defendant's argument based on the conditions to the loan was rejected by the Circuit Court on multiple occasions, the first on Defendant's Motion for Summary Disposition. At that point in the case, the Circuit Court agreed that there was a question of fact as to whether Plaintiffs had satisfied the actual conditions to the making of the loan, as opposed to the secret, additional conditions relied upon by the Bank (TR., S.D. Motion Hearing, 8/21/02, p. 13)[41]; (S.D. Denial Order entered: 8/28/02).[41]

Most importantly, Defendant's own decisionmaker, Ms. Cowan, testified, as she had to when confronted with the pertinent exhibits, that all of the conditions of the letter were fulfilled, with one possible exception. That one exception was condition No. 4, requiring "satisfactory appraisal by a Flagstar approved appraiser for at least $275,000." Cowan admitted that as of the March 24, 1999 date of the approval letter Flagstar had in its possession an appraisal (Trial Exh. 18, p. 24)[42] prepared by an appraiser that the Bank itself had chosen which appraised the property at $281,000. The only appraisal "condition" left unsatisfied was the secret "condition" with respect to the "ten acre appraisal". That "condition" was simply not part of the promise, the jury could more than reasonably conclude.

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[38] Exhibit E
[39] Exhibit G
[40] Exhibit C
[41] Exhibit I
[42] Exhibit R

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The "existence and scope of the promise are questions of fact, and 'a determination that the promise exists will not be overturned ... unless it is clearly erroneous.'" State Bank of Standish v Curry, 442 Mich 76, 84 (1993). This is not a case in which the conditions to the promise were never satisfied. Compare, Defendant's references to First Security Savings Bank v Aitken, 226 Mich App 291, 311-316 (1997); Bivans Corp. v Community National Bank of Pontiac, 15 Mich App 178, 182 (1968). Defendant cites these cases for the proposition that the Plaintiff cannot construct a detrimental reliance or estoppel theory on a conditional promise, especially when the condition did not take place. That, so far as it goes, is accurate. But it is quite another concept which Defendant advances here: that even though Plaintiffs satisfied each of the actual, expressed conditions to the promise, they still cannot recover, because Defendant secretly established additional "conditions" which Plaintiffs never fulfilled. But that is not the law. Indeed, in each of the aforementioned decisions, Aitken and Bivans Corp., supra, an expressed condition was not satisfied. Aitken, 226 Mich App at 316; Bivans Corp., 15 Mich App at p. 182. Defendant (and this is hardly surprising) can cite no cases which stand for the proposition that even though the Plaintiff complied with each of the conditions expressed in the written promise, the Plaintiff still cannot recover, because the promise was "conditional" in the first place, or due to non-fulfillment of unexpressed condition(s). Whatever conditions were part of Defendant's promise were fulfilled. The additional, secret conditions cited by Defendant were simply not part of Defendant's promise.

In these circumstances, the expressed conditions, once fulfilled, did not preclude Plaintiffs from justifiably relying on the promise in understanding that Defendant had made a commitment to make the loan. State Bank of Standish, 442 Mich 76, 84-85. At that point,

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Defendant "should reasonably have expected to induce [Plaintiffs'] action of a definite and substantial character ..." Ardt v Titan Insurance Co., 233 Mich App 685, 692 (1999).

Plaintiffs' claim was not that Defendants had waived any specific conditions of the commitment letter, but rather, that Plaintiffs had satisfied all of the expressed conditions precedent to the loan commitment itself. Plaintiffs' claim does not involve a verbal waiver of "a provision of a loan, extension of credit, or other financial accommodation" at all. MCLA 566.132(2)(c), supra. Plaintiffs proved at trial, that they satisfied all of the actual conditions to the loan, as shown by Cowan's testimony and the pertinent exhibits.

IV. DEFENDANT'S APPLICATION FOR LEAVE RAISES NO ISSUES OF SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

The doctrine of promissory estoppel was developed in this State to protect the ability of individuals to trust promises in circumstances where trust is essential. State Bank of Standish v. Curry, 442 Mich 76, 83 (1993). The public policy of the state does not require that Flagstar Bank be allowed to avoid its written commitments. The legislature, in MCLA 566.132(2) codified a policy prohibiting suits to enforce unwritten promises or commitments of financial institutions. The jury answered Question No. 1 submitted to it in this case in the affirmative, establishing that the promise enforced against Flagstar was in writing and signed with an authorized signature. Flagstar was in no way deprived of the right to set conditions in its written commitment. Plaintiff simply proved to the jury that those conditions had been fulfilled, based upon the testimony of Flagstar's own loan officer, O'Connell, and underwriter, Cowan.

Plaintiffs' right to have their legal claims tried to a jury has been preserved by the Court of Appeals reinstating the jury verdict in this case. While, in circumstances where contractual language is clear, interpretation of the meaning of a contract is left to a court, the determination of whether a contract exists at all is typically within the province of a jury, as it was in this case.

The Supreme Court is not in a position to make a factual finding that a contract existed between the parties in this case when the jury did not so find. No public policy would be served by the Michigan Supreme Court substituting its own findings for those of the jury in this case.

C. CONCLUSION

Based on the foregoing, Defendant's Application for Leave to Appeal should be denied.

Respectfully submitted,

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By: _____

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